United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7664

To be argued by
SEYMOUR SHAINSWIT

B

United States Court of Appeals

FOR THE SECOND CIRCUIT

CHAMPION INTERNATIONAL CORPORATION,

Plaintiff-Appellee,

—against—

CONTINENTAL CASUALTY COMPANY,

Defendant-Appellant.

P/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEE'S BRIEF

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April 20, 1976

B

Jack Hart, Esq.
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Re: Champion International Corporation
v. Continental Casualty Company 75-7664

Dear Jack:

After filing our appellee's brief to the Second Circuit in the above matter, we discovered a small but crucial printer's error on page 33. In connection with the discussion of the National Screen case in the first full paragraph of the text on page 33, the last word of the paragraph before the parenthetical citation should be changed from "insured" to "insurer".

We are arranging to have all filed copies of the brief corrected. You should do likewise with the copies served on your office.

Sincerely yours,

Seymour Shainswit

eo

cc: Clerk
United States Court of Appeals
for the Second Circuit

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FOR THE SECOND CIRCUIT

Docket No. 75-7664

CHAMPION INTERNATIONAL CORPORATION,

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APPELLEE'S BRIEF

Preliminary Statement

Defendant, Continental Casualty Company ("Continental"), is appealing from a judgment granting plaintiff, Champion International Corporation ("Champion"), a recovery of $1 million, plus interest, on an "Umbrella Excess Third Party Liability Policy" (the "Umbrella Excess policy") (JA 447-489)* issued to Champion by Continental. The total judgment awarded Champion was $1,320,139.64 (JA 305-6).

With the consent of both sides, the trial had been bifurcated. Liability was tried first; thereafter, following a separate hearing, the Court determined the issue of damages and awarded judgment accordingly (JA 99-104, 302-4).

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* References to parts of the record reproduced in the joint appendix will be designated by the letters "JA" followed by the page in the joint appendix. Otherwise, references to exhibits will be by exhibit number as indicated in the index to the record on appeal and references to other documents not reproduced in the joint appendix will be to the part of the record and pages involved; e.g., Response to Request for Admissions, p. 5.

At the trial on liability, there was no dispute as to the facts constituting the framework of the issue of liability. Continental itself judicially admitted that Champion had purchased defective panels from one source, Continental Vinyl Products Corp. ("Continental Vinyl"), that the Continental Vinyl panels had a common latent defect, and that all the property damage flowing from the delamination of the defective Continental Vinyl panels installed by manufacturers in completed vehicles, is within the coverage of a Comprehensive General Liability Policy, issued to Champion by Liberty Mutual Insurance Company (the "Liberty Mutual policy") and Continental's Umbrella Excess policy (JA 583-8, 105-8, 156-7).

Continental's Umbrella Excess policy picked up the excess over the $100,000 limit of liability in the Liberty Mutual policy. The Continental policy indemnified Champion to a limit of $1,000,000 for any occurrence in excess of the amount recoverable from Liberty Mutual. At the trial on liability, despite Liberty Mutual's payment of the full underlying coverage, and despite the fact that Champion sustained a loss of more than $1,600,000, Continental contended that Champion is entitled to an indemnification of absolute zero, i.e., that Liberty Mutual should not have paid anything to Champion, and that Continental can wriggle out of its undertaking in its Umbrella Excess policy.

Continental urged as its *sole* and *exclusive* position on the issue of liability the thesis that the damage to each of the 1,400 manufactured vehicles which utilized defective Continental Vinyl panels was a separate occurrence. From this self-generated postulate that each incident of property damage is a separate occurrence Continental then concluded that the $5,000 deductible in the Liberty Mutual policy should, by some alchemy, inexorably, be construed to apply separately with respect to every damaged manufactured product, unit by unit, and thereby cancel out Liberty Mutual's comprehensive coverage and make Continental's Umbrella Excess policy an empty charade (JA 163, 302, 589).

The bizarre thesis on which Continental had staked its all was, however, undercut by the clear and emphatic unifying directive in the Liberty Mutual policy that:

> "For the purpose of determining the limit of the company's liability . . . all . . . property damage arising out of continuous or repeated exposure to substantially the same general conditions . . . shall be considered as arising out of one occurrence." (Section IV, Limits of Liability: Non-Cumulative of Liability—Same Occurrence, Liberty Mutual Endorsement No. 1) (JA 498-9).

Continental acknowledged that this unifying definitional directive is "the basic provision" controlling the construction of the Liberty Mutual policy (JA 117-8).

Continental further acknowledged that, under controlling New York law, the burden which it must carry is to show, clearly and conclusively, that the construction it urges is the *only* one that fairly could be placed on the policy (JA 143).

Accordingly, the Court below ruled in favor of Champion since Champion's position that all property damage from the delamination of the vinyl-covered panels is to be considered as arising from one "occurrence", since that damage arose out of continuous or repeated exposure to substantially the same general conditions, is a reasonable interpretation, and that is all that Champion is required to prove (JA 163-5).

On the issue of damages, Continental conceded that Champion had paid Liberty Mutual a total of $1,513,116.82 for the settlement of the claims for property damage in connection with the delamination of the defective vinyl-covered panels and for expenses and fees for the investigation, adjustment and settlement of those claims (See, Response to Request For Admissions, Page 5; and JA 185-193, 247-8, 303).* Continental conceded that these payments were reasonable and were made in good faith by Champion.

Continental, however, sought to convert the hearing on damages into a microscopic massive exploration of *1,400 separate time periods* through the artifice of simply resurrecting its rejected position on liability that the damage

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* These payments were above the $100,000 paid out under Champion's underlying policy with Liberty Mutual.

to each vehicle was a separate occurrence. Continental made plain at the hearing, that its stratagem is to fragmentize the single occurrence already adjudicated in the hearing on liability, and to pursue 1,400 separate trials with respect to each of the 1,400 vehicles, vehicle by vehicle, as to the point in time that the interior panels in each vehicle commenced to delaminate. Continental had already heralded, shortly prior to the hearing on damages, that it intended to put the Court and its insured, Champion, to the incredible burden of travelling the labyrinthine road of resolving, vehicle by vehicle, and panel by panel, the mushrooming stages of delamination, with all that connoted: innumerable trials, with hordes of claimant witnesses, to delve into the minutiae of the delamination process as it affected each vehicle (See pages 2-5 of Affidavit of Seymour Shainswit, filed on August 5, 1975 in opposition to defendant's motion to overrule objections).

And Continental echoed this position at the trial on damages, heedless of the fact that since the damage sustained by a single vehicle was always less than $5,000, and in many instances just a few hundred dollars, the cost of travelling the road proposed by Continental would perforce render the policy that it issued impractical, pointless and illusory (JA 242-244).

Judge Solomon ruled that it was much too late for Continental to seek to re-try liability. Indeed, at the trial on liability, no contention had been advanced by Continental that it was not liable for any categories of specific claims encompassed in the total payments made by Champion. In any event, the Court had already determined that the damage to all of the vehicles arose from a single occurrence. Against the backdrop of the Court's opinion on liability, Continental in effect conceded, as it had to, that the times of delamination were irrelevant at the damage stage of the case (JA 244-246).

At the threshold, it is well to recall that we are not construing a statute, but the words of an insurance policy. And in construing the policy, this case involves no novel or unsettled question of law. Rather, we are concerned simply with the application of the basic rubrics of New

York insurance law so cogently marshalled by this honorable Court in *National Screen Service Corp.* v. *United States Fidelity and Guaranty Company*, 364 F.2d 275 (2d Cir.), *cert. denied*, 385 U.S. 958 (1966), which interdict Continental's self-serving semantic shadings and evisceration of the insurance coverage that was within the reasonable expectation and purpose of Champion in obtaining the package of Comprehensive General Liability insurance and Umbrella Excess Third Party Liability insurance to cover precisely the exposure that occurred.

Corrected Statement of the Issues Presented for Review

In the light of the actual record, the true issues are:

1. Where the Liberty Mutual policy in its key section, the section determining the amount recoverable thereunder, provides a unifying definitional directive that "all property damage arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence", is Champion's position that all property damage from the delamination of the vinyl-covered panels is to be considered as arising from one occurrence, a possible reasonable construction of the policy?

2. Is it the *only* possible construction of the Liberty Mutual policy that each incident of property damage, vehicle by vehicle, must be treated as subject to the $5,000 deductible, despite the unifying directive, and despite the policy's express rejection of a "per claim" deductibility standard?

3. Where, at the trial on liability, Continental conceded coverage and pinned its entire defense to the sole and exclusive contention that the damage to each vehicle was a separate occurrence, was the trial court bound, at the later trial on damages, to permit Continental to re-try liability and to present new contentions which it had never raised at the prior trial?

4. The trial court having already adjudicated, in resolving the issue of liability, that all the property damage arose from a single occurrence, was the Court nevertheless required, at the hearing on damages to fragmentize the single occurrence and to conduct a series of trials as to when interior panels in each of 1400 vehicles in point of time commenced to delaminate?

5. Where the internal provisions of Continental's own policy indicate that Champion is entitled to recover all of its damages proximately caused by a single occurrence rooted in the policy period, was it not incumbent upon Continental, if it desired to have its policy cover only a part of the damages, to insert such a limitation or exclusion of coverage clearly and explicitly in its policy?

6. In urging that its policy covered only part of the damages flowing from the single occurrence, is Continental devising a limit of coverage barred by public policy concepts?

Corrected Statement of the Case

We do not believe that the Appellant's presentation puts this Court at a proper vantage point to resolve Continental's appeal. Without further characterization, Continental has presented a slanted, distorted and fragmentized version of the actual record. Among other things, Continental suppresses the central feature that in the hearing on liability the parties in effect mutually conceded the facts constituting the framework of the issue of liability. Indeed, Judge Solomon complimented both sides for their objective streamlining of the case (JA 156-7). The entire transcript of the hearing on liability (JA 105-158) speaks for itself in underscoring the correctness of Judge Solomon's observation, at the close of the hearing that:

> "THE COURT: I am proceeding on the basis that the parties, with commendable frankness, have admitted the facts." (JA 156)

Selectivity may be essential to the art of brief writing, but it is unfair for the Appellant to distort beyond recog-

nition what transpired below in submitting the case to Judge Solomon. The following summary, buttressed by precise references to the actual record, will provide the most effective correction of Continental's tendered presentation.

The repeated injurious exposure to substantially the same general conditions

In 1969 and 1970, Champion was engaged in the business of purchasing vinyl-covered panels from Continental Vinyl, a California company, and supplying those panels to manufacturers of houseboats, house trailers, motor homes and campers, who used those panels to manufacture their products. Champion purchased from this one source, Continental Vinyl, supplies of vinyl-covered panels sufficient to meet estimated production requirements of Champion's customers as previously communicated to Champion. Shipments of the Continental Vinyl panels were made by Champion to each customer as required by the customer (JA 159, 343, 380, 399-401, 420-1, 437, 584-5).

The Continental Vinyl panels sold by Champion to its customers, the manufacturers of the vehicles, had a common latent defect. After the vehicles had been completed, many of the Continental Vinyl panels installed in the products began to delaminate; that is, the vinyl film covering the panels peeled away from the underlying substrate to which the vinyl film had been attached, thereby causing property damage to the completed products by reason of the delamination. The bulk of the installation of the defective panels in completed products occurred in 1969, with a spillover into 1970 (JA 159, 343-4, 354-7, 364-8, 378-9, 381, 385, 397-400, 404-5, 420, 436-7, 439-40, 584-5).

Complaints of delamination from the manufacturers and their customers poured in during 1969 and 1970, when it was discovered that the Continental Vinyl panels had peeled away in the interiors of huge numbers of completed vehicles (JA 159; see also, e.g., JA 308, 312-3, 355-7, 385, 397, 404-7). On this record it is absolutely preposterous for Continental to blandly assert there is "*nothing* in the record as to when

the panels actually delaminated" (Continental's Brief, p. 15; emphasis added). The record abundantly demonstrates that the delamination occurrence is rooted in 1969 and 1970. Indeed, as of March 22, 1971 a total of $645,019.61 had already been paid in *settlement* of Champion's liability for some of the property damage. In addition, by March 22, 1971 Champion had also incurred expenses totalling $92,565.27 for the fees and expenses of investigation, adjustment and settlement of claims (JA 23, 28, 31-68); see also the exhibit received in evidence at the hearing on damages entitled "Payments made to investigate and settle claims of property damage arising from delamination of vinyl-covered panels manufactured by Continental Vinyl Products Corp." (JA 298).* Continental ignores the obvious fact that a delamination claim perforce preceded each settlement (JA 23, 214, 247).

Mr. Bob J. Higgins, the President of Cobra Industries, Inc., testified, for example, that his company had produced 224 damaged campers and trailers from April 9, 1969 through November 19, 1969, and Cobra stopped production on November 19, 1969 because of the "numerous complaints" of delamination (JA 355-7, 364-8).

Mr. William B. Caldwell, Vice-President of Nauta-Line, Inc., which had manufactured 260 damaged houseboats from April 3, 1969, through June 25, 1970, testified to numerous conversations and meetings in 1970 because of the mushrooming delamination of Nauta-Line completed vehicles (JA 385).

Mr. Richard Lyman Elder Lofgren, President of Lofgren Manufacturing Company, testified that all of his company's 191 damaged trailers were manufactured in 1969 and 1970, and that on June 10, 1970 Lofgren stopped using Continental Vinyl panels in its manufacturing process because numerous delamination complaints from customers had

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* This exhibit is Exhibit 2 as listed in Stipulation dated January 22, 1976, and Index to the Record on Appeal. Exhibit 2 also establishes that as of February 1, 1971, the expiration date of Continental's Umbrella Excess policy, Champion had already incurred settlement payments and expenses, above the Liberty Mutual coverage, of $512,580.59.

already made all too plain the magnitude of the property damage (JA 404-7).

The two policies which Champion had purchased to provide insurance coverage, comprehensive and as an umbrella excess, for the precise type of property damage caused by an occurrence as herein described are:

1) A Comprehensive General Liability Policy issued by Liberty Mutual (listed as Exhibit 6 in the Exhibits Index to the Record on Appeal); and

2) An Umbrella Excess Third Party Liability Policy, issued by Continental (JA 447-489)

The Liberty Mutual policy was an annual policy, with an annual period beginning and ending on October 31 of each year in which it was effective, and the policy was renewed and in effect, without change in its provisions, during the entire period of Continental's Umbrella Excess policy.*

The Liberty Mutual Comprehensive policy limited the amount recoverable for property damage caused by an "occurrence" to $100,000 above a deductible amount of $5,000 "per occurrence" (JA 160).

The Continental policy provided the following excess and umbrella coverage:

The limit of Continental's liability was $1,000,000 with respect to any one "occurrence" in excess of (a) the amount recoverable under Champion's underlying insurance in respect of occurrences covered by such underlying insurance; or in excess of (b) $25,000, with respect to each "occurrence" not covered by such underlying insurance. (Declarations, Item 3(A).) With respect to losses arising from more than one "occurrence" the limit of Continental's liability was $1,000,000 in the aggregate for each annual period (Declarations, Item 3(B)) (JA 447).

We pause to correct Continental's misstatement in its brief (at p. 3) that Continental's Umbrella Excess policy covered a policy period from November 30, 1967 to November 30, 1970. In fact, upon payment of additional premiums,

* The Liberty Mutual policy reproduced in the Joint Appendix (JA 490-539) typifies the nature of the underlying Liberty Mutual policy provisions.

as attested by the last two pages of the policy exhibit in evidence, the expiration date of the Umbrella Excess policy was extended to February 1, 1971 (JA 488-9).

In the proceedings before Judge Solomon, Continental conceded that the damage to the completed vehicles caused by the delamination of the panels constituted property damage covered by the Liberty Mutual and Continental policies (JA 163; see also JA 587-8). Continental's trial concession of coverage concluded its shifts and turns on this subject. On June 3, 1970 Continental had written to Marsh and McLennan, Inc., the insurance broker, acknowledging coverage.* Notwithstanding, six months later, on December 30, 1970, Continental filed its Answer specifically "den[ying] that said alleged property damage is within the coverage of said Umbrella Policy" (JA 16). It was not until the pre-trial conference before Judge Solomon on September 20, 1974, that Continental abandoned its pleaded denial of coverage (JA 94). In its trial briefs Continental repeated its admissions as to coverage (JA 163, 587).

We also fill the void in Continental's brief concerning Liberty Mutual's meticulously documented role in investigating, adjusting and settling Champion's liability for property damage in connection with the delamination of the defective vinyl-covered panels: Liberty Mutual had advised Champion, on March 5, 1970:

> "[W]e have conducted an extensive investigation on the reported claims on the Continental Vinyl matter. It is our opinion that the value of the claim settlements will exceed our policy limit of $100,000, for one occurrance. [sic]
>
> "It is urgent that your excess carrier be notified at the earliest possible date." (JA 71).

Continental, in a four-way correspondence embracing itself, Marsh and McLennan, Liberty Mutual and Champion, was advised of the likelihood that the amount required to

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* This letter had been suppressed by Continental in discovery proceedings. See pp. 8-9, and Exhibit "C" of Champion's moving affidavit for an order compelling Continental to produce documents (Document No. 44 in the Index to the Record on Appeal).

settle the claims on the Continental Vinyl occurrence would exceed the amount recoverable by Champion under the Liberty Mutual policy; and Continental agreed to Champion's employment of Liberty Mutual to continue to investigate and settle all such claims (JA 70-4, 308-9; see also Judge Solomon's finding, JA 303).

Liberty Mutual, utilizing its own personnel, as well as outside appraisers, inspected and appraised the damage to each completed vehicle (JA 214, 217). Liberty Mutual prepared and maintained an accounting volume, keyed to each manufacturer of damaged vehicles (JA 214), entitled "Payments Made to Investigate and Settle Claims of Property Damage Arising from Delamination of Vinyl-Covered Panels Manufactured by Continental Vinyl Products Corp." (listed as Exhibit 2 in the Index to the Record on Appeal).

In said Exhibit 2, Liberty Mutual meticulously recorded and tabulated all claims which it settled on behalf of Champion by identifying each person who received each payment, specifying the date of issuance and the number of each check through which each payment was made and stating the amount of each payment. In separate schedules of this exhibit, Liberty Mutual provided similar itemization for each outside appraiser who had received payments for services rendered in connection with the investigation and settlement of the claims.

The format of Exhibit 2 is set forth in the Schedules annexed to Champion's Answers to Continental's Interrogatories (JA 30-68). That format was uniformly followed by Liberty Mutual in its periodic reports summarizing settlement payments (JA 312-336). Continental conceded that Liberty Mutual's fee of 15 percent of the sums paid in settlement and of allocated expenses in investigating, adjusting and settling the claims, is a reasonable fee (JA 213).

Continental also conceded that, over and above the $100,000 paid by Liberty Mutual under its policy and the $5,000 deductible, Champion paid Liberty Mutual a total of $1,513,116.82 for the settlement of the claims for property damage in connection with the delamination of the defective vinyl-covered panels and for expenses and fees

for the investigation, adjustment and settlement of those claims (JA 303; see also JA 185-193 and 247-8). Continental conceded that those payments were reasonable and were made in good faith by Champion. They were made for the purpose of settling liability against Champion because of the defective vinyl-covered panels which Champion had acquired from Continental Vinyl (JA 303).

At the trial on liability, Champion filed with the Court, as part of the record, the depositions of five manufacturers of damaged vehicles who had installed, in their units, the defective Continental Vinyl vinyl-covered panels which they had purchased from Champion. We refer to the depositions of Cobra Industries, Inc., Nauta-Line, Inc., Lofgren Manufacturing Company, Rancho Trailers, Inc. and Riviera Manufacturing Co. Inc. (JA 337-445).

These five depositions played a key role in effecting the accord of the parties, at the trial of liability, that there was no dispute with respect to the facts constituting the framework of the issue of liability (JA 155). The five depositions provided concrete and telling illustrations of the "unified presentation" with respect to the operative facts controlling the issue of liability (JA 155). Each of the five manufacturers testified that each unit which it had manufactured, and which was specifically identified by unit numbers in schedules attached to the respective depositions, had been unmistakably completed, and the defective panels had been unmistakably installed, within the policy period of the Umbrella Excess policy. Each manufacturer also, as we have noted, emphatically emphasized that the flood of complaints of delamination had originated during the Continental policy period; and, in particular, that all damaged units involving their specific vehicles, which Liberty Mutual had settled, harkened back to vehicles which had been manufactured during the Liberty Mutual and Continental policy period (JA 337-445).

The five depositions provided the predicate for a bedrock documented record that in connection with the property damage flowing from the delamination catastrophe, five of Champion's customers alone accounted for an exposure in excess of the $1,000,000 limit of liability in the Continental

Umbrella Excess policy. Trial Exhibit 2 establishes, vis-à-vis settlement payments involving units manufactured by these five customers of Champion, the following financial computations:

Manufacturer	*Amount Paid in Settlement of Claims*	*Amount Paid in Allocated Expenses**	*Subtotal*
Cobra Industries, Inc.	$ 361.116.54	$ 7,531.75	$ 368,648.29
Nauta-Line, Inc.	338,791.91	7,456.79	346,248.70
Lofgren Manufacturing Company	124,119.03	9,945.86	134,064.89
Rancho Trailers, Inc.	145,983.97	2,451.35	148,435.32
Riviera Manufacturing Co. Inc.	45,702.97	1,189.99	46,892.96
	$1,015,714.42	$28,575.74	$1,044,290.16
	LESS [$100,000 Liberty Mutual payment, plus $5,000 deductible]		— 105,000.00
			$ 939,290.16
	PLUS: Unallocated Expenses**		+ 140,893.52
	GRAND TOTAL		$1,080.183.68

* "Allocated Expenses" are those amounts paid to outside appraisers for their services in connection with the investigation and settlement of claims.

** "Unallocated Expenses" are those amounts (15% of the sum of claims and expenses) which were paid to Liberty Mutual for their services in settling the claims.

Accordingly, since these five depositions already established payments in excess of the Continental policy limits, there was no need for Champion to obtain superfluous and unnecessary additional testimony encompassing additional liability for property damage because of the defective vinyl-covered panels beyond the figure of $1,080,183.68 already laid bare on the record before Judge Solomon. In any event, it may be pertinent to observe that, as reflected in Trial Exhibit 2, Liberty Mutual, on behalf of Champion, paid out, in settlement of property damage claims involving damaged units produced by a sixth manufacturer, All

Star Coach, Inc., who had acquired the defective vinyl-covered panels from Champion, the following sums:

Manufacturer	*Amount Paid in Settlement of Claims*	*Amount Paid in Allocated Expenses*	*Subtotal*
All Star Coach, Inc.	$111,065.45	$17.89	$111,083.34
	PLUS: Unallocated Expenses for Keystone Coach		+16,662.50
	GRAND TOTAL		$127,745.84

In a report to Champion as early as May 12, 1970, Liberty Mutual had already identified All Star Coach as the manufacturer of damaged vehicles, utilizing defective vinyl-covered panels involved in the Continental Vinyl occurrence (JA 312-3). Adding the $127,745.84 settlement payments involved in damaged All Star Coach vehicles to the $1,080,183.68 payments in settling the claims involving the vehicles of the other five manufacturers, we thus have a documented total for property damage settlements of $1,207,929.52, involving vehicles manufactured by just six of Champion's customers, which account for an exposure already $200,000 in excess of the Continental policy limit. Various other manufacturers accounted for the balance of the completed products produced with defective Continental Vinyl panels. Basically, no other manufacturer was involved in the production of damaged vehicles which culminated in aggregate claims in excess of $10,000; and, hence, nothing more need be said about these other damaged units. For purposes of recovery against Continental, we need only refer to the claims involving the units manufactured by the five Champion customers who were deposed; the sixth customer, All Star Coach, has been mentioned solely in order to spotlight how few of Champion's customers were actually involved in reaching Champion's exposure for property damage to a sum $200,000 beyond the $100,000 Liberty Mutual policy and the $1,000,000 Continental Umbrella Excess policy.

As we have noted, Liberty Mutual paid to Champion $100,000, the amount of the underlying limit on account of

the occurrence covered under the Liberty Mutual policy. Liberty Mutual advised Champion, by letter dated May 6, 1970, that it and Champion "are in agreement on a position that all these claims constitute one occurrence." (JA 85). Liberty Mutual also rejected Continental's specious thesis (Appellant's Brief, p. 6) that it, Liberty Mutual, should agree to arbitrate Champion's rights under its Umbrella Excess policy with Continental. As Liberty Mutual correctly pointed out (JA 85): "The excess insurance problem does not exist between Liberty Mutual and C N A. U.S. Plywood-Champion Papers has the contractual relationship with C N A."

It is unworthy of Continental, in its brief to this Court (at pp. 5 and 13), to seek to trade on an argumentive irrelevancy that the Liberty Mutual policy was of the retrospective type. Continental, in its main brief submitted at the trial on liability, acknowledged (at p. 8) that this detail "may have no significant legal effect with respect to the instant case".*

Nor does it make sense for Continental to urge (Appellant's Brief, p. 5) that Champion was somehow required to sue Liberty Mutual despite the fact that Liberty Mutual had chosen to honor its own obligations and to pay to Champion the full underlying coverage. There certainly was no duty on the part of Liberty Mutual to dishonor its own policy, and to engage in litigation with Champion as to the construction of the Liberty Mutual policy, particularly where, under settled principles of insurance law (Point I, *infra*) as applied to the broad and all-encompassing language of the Liberty Mutual policy, Liberty Mutual would have been doomed to defeat.

We respectfully submit that on the actual record of this case, and on the conclusive evidence of the policies themselves, there is not a scrap of justification for Continental's posture that Champion should receive *absolutely nothing*. The policy language of Liberty Mutual's Comprehensive General Liability policy, fortified by the unifying defini-

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* Continental's main brief on the issue of liability is listed as document 69 in the Index to the Record on Appeal.

tional directive that all property damage from the delamination of the vinyl-covered panels is to be considered as arising from one occurrence, since that damage arose out of continuous or repeated exposure to substantially the same general conditions, compellingly underscores the propriety of the construction which Liberty Mutual placed upon its own standard policy in fulfilling its insurance obligation to Champion. As a matter of law, Liberty Mutual could not have done otherwise.

Further, the actual provisions of Continental's own undertaking in its Umbrella Excess Third Party Liability policy, pose a further insuperable barrier to Continental's urgings that its own policy can be eviscerated beyond recognition so as to render virtually illusory the coverage for which Champion had paid premiums. Indeed, Continental, in its brief, has virtually suppressed the text of its own policy, and has provided only a limited explanation of the Liberty Mutual policy. We believe that the following exposition does more exact justice to the texts of both policies.

The Terms of Liberty Mutual's Underlying Comprehensive General Liability Policy

Liberty Mutual agreed to provide Champion with property damage liability coverage as follows:

> "The company will pay on behalf of the insured all sums which the insured shall be legally obligated to pay as damages because of . . . property damage to which this policy applies, caused by an occurrence . . . but the company shall not be obligated to pay any claim or judgment . . . after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements." (JA 491)

Pursuant to 3(B) of the Declarations, the limits of liability were stated as $100,000 each occurrence and $200,000 aggregate (JA 490a). An endorsement, Endorsement No. 8, provided for a deductible amount of $5,000 per "occurrence" (JA 510-11). The printed form of Endorsement

No. 8 provided for a designation as to whether the deductible amount was to apply per claim or per occurrence. Per occurrence was chosen. We reproduce the pertinent text of Endorsement No. 8:

"SCHEDULE

Coverage	Amount and Basis of Deductible
Bodily Injury Liability	$ per claim
	$ per occurrence
Property Damage Liability	$ per claim
	$5,000 per occurrence"

Continental's brief, at page 19, deletes with asterisks that portion of the printed form of Endorsement No. 8 to the Liberty Mutual policy which provided for a designation as to whether the deductible amount was to apply per claim or per occurrence. Patently, it ill becomes Continental, in urging that each manufactured vehicle which utilized defective Continental Vinyl part was a separate occurrence, to in effect rewrite the Liberty Mutual policy by now substituting a per claim basis (for that is what Continental's argument inexorably connotes) for the actual per occurrence basis, and, to boot, to seek to define the nonexistent per claim basis in terms of treating each damaged completed product as a separate claim.

Indeed, if all this were not enough, the very definition of a "per occurrence basis" in the Liberty Mutual policy refutes Continental's postulate that the deductible amount should be applied to each incident of property damage, unit by unit, and thereby scrap the unifying definition, cancel out Liberty Mutual's comprehensive coverage, and make Continental's Umbrella Excess policy an empty charade. Quite the contrary. Endorsement No. 8 speaks for itself in limiting the application of the deductible to "all" [and not each incident of] damages, because of "all property damages as the result of any one occurrence." We quote this pertinent section of the Liberty Mutual policy:

> "(b) PER OCCURRENCE BASIS—If the deductible is on a "per occurrence" basis, the deductible amount applies under the Bodily Injury Liability or Property Damage Liability Coverage, respectively, to *all* damages because of *all* bodily injury or property damage *as the result of any one occurrence.*" (Emphasis supplied). (Liberty Mutual policy, Endorsement No. 8). (JA 510)

The Liberty Mutual policy included the following Definitions:

> "'*occurrence*' means an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured;
>
> * * *
>
> "'*damages*' includes . . . damages for loss of use of property resulting from property damage;
>
> * * *
>
> "'*property damage*' means injury to or destruction of tangible property." (JA 493)

The broad definition of "occurrence" as "including injurious exposure to *conditions*" connoted that the "injurious exposure" could take place over an extended period of time—instead of all at once. Exposure to "conditions" resulting in property damage may continue for days, weeks, months or even years. Accordingly, the Liberty Mutual policy also provided that where, as here, Liberty Mutual has paid to Champion its $100,000 per occurrence limit for property damage arising out of continuous or repeated exposure to substantially the same general conditions, Liberty Mutual has no further liability in subsequent policy periods for additional loss resulting from the occurrence:

> "If the same occurrence gives rise to . . . property damage which occurs partly before and partly within

> the policy period, the each occurrence limit and the applicable aggregate limit or limits of this policy shall be reduced by the amount of each payment made by the company with respect to such occurrence under a previous policy or policies of which this policy is a replacement" (Endorsement No. 1). (JA 499)

In short, $100,000 is the maximum limit of Liberty Mutual's liability even if part of the damages in question arose in its first policy period (10/31/68 to 10/31/69) and part of the damages arose in its second policy period (10/31/69 to 10/31/70). (JA 159, 161)*

The Liberty Mutual policy also explicitly recognized that as the result of any one occurrence, Champion was entitled to coverage for its liability for all damages sustained by one or more persons or organizations as the result of the injurious exposure to conditions:

> "Coverage B—The total liability of the company for all damages because of all property damage sustained by one or more persons or organizations as the result of any one occurrence shall not exceed the limit of property damage liability stated in the declarations as applicable to 'each occurrence'." (Section IV, Limits of Liability.) (JA 492)

Even if the Liberty Mutual policy had said nothing more than the provisions quoted above, the expansive definition of an occurrence in a comprehensive general liability policy, when coupled with the rejection of a "per claim" deductibility standard, and the other provisions cited, would by themselves suffice to support a reasonable reading to

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* Continental's brief (e.g., p. 5) seeks to construct an air of mystery as to "how many of the annual Liberty Mutual policies must respond". The short answer is that Liberty Mutual's obligation under its two policies spanning the period of October 31, 1968 to October 31, 1970 was to pay $100,000, the amount of the underlying limit on account of the single occurrence. That limit had been reached and paid during the period of the Umbrella Excess policy; and there is no justification for Continental's obfuscating vapor with which it seeks to envelop Champion's insurance rights.

which Champion is entitled as a matter of law, that continuous or repeated exposure to substantially the same general conditions constitutes a single occurrence in the circumstances of this case.

The Liberty Mutual policy, however, leaves no room for doubt as to the propriety of the construction which Liberty placed upon its own standard policy. In its key section, the section determining the amount recoverable thereunder, the Liberty Mutual policy provided, in terms and in language that leave no room for quibble:

> "For the purpose of determining the limit of the company's liability . . . all . . . property damage arising out of continuous or repeated exposure to substantially the same general conditions . . . shall be considered as arising out of one occurrence." (Section IV, Limits of Liability; Non-Cumulative of Liability—Same Occurrence, Liberty Mutual Endorsement No. 1.) (JA 498-9)

Applying the Liberty Mutual policy provisions* to our record:

a) the *"injurious exposure"* resulting in property damage has been the installation of defective vinyl-laminated plywood panels in completed products manufactured by others;

b) the *"conditions"* to which the property suffering damage has been exposed are the *defective panels manufactured by Continental Vinyl which inexorably delaminated following installation;* and

c) all diminution in value (*property damage*) resulting from the continuous or repeated installation by

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* Indeed, every pertinent provision cries out against Continental's thesis that the Liberty Mutual policy can be contorted into equating each incident of damage to a vehicle with a separate occurrence. The entire thrust of the Liberty Mutual policy, from its opening declarations as to the coverage for property damage liability "caused by an occurrence", through all of the ensuing definitional provisions, capped by the unifying definitional directive, makes it crystal clear that an "occurrence" is defined as the cause of property damage, and not as each incident of damage, unit by unit.

manufacturers in a completed product (*exposure*) of defective panels manufactured by Continental Vinyl which inexorably delaminated (*substantially the same general conditions*) constitutes property damage arising out of one occurrence within the meaning of the Liberty Mutual policy.

The Terms of Continental's Umbrella Excess Third Party Liability Policy

Continental's brief restricts itself essentially to two cryptic references to the Continental policy. Continental refers to paragraph 3 of the Insuring Agreements, which, under the heading "Policy Period-Territory", recites: "This policy applies only to occurrences happening during the policy period anywhere in the world." (JA 449). And then we are favored simply with Continental's fragmentary recital of the definition of an occurrence (Continental's brief, p. 35). We believe that the other policy provisions have been omitted from Continental's brief because they militate against Continental's arguments. Thus: Continental's Umbrella Excess policy, in Insuring Agreement No. 1, indemnified Champion for all sums which Champion became obligated to pay

> "for damages, direct or consequential, and expenses, all as defined by the term 'ultimate net loss' on account of,
>
> . . .
>
> "Property Damage; or
>
> . . .
>
> "caused by or arising out of each occurrence." (JA 448).

The Continental policy, in Definition number 7, defined "Ultimate Net Loss" as follows:

> "7. *Ultimate Net Loss*
>
> "The term 'Ultimate Net Loss' shall mean the total sum which the Insured or any company as his insurer becomes obligated to pay by reason of . . . Property Damage . . . , either through adju-

> dication or compromise, and all sums paid for expense, . . . in respect to litigation, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder . . ." (JA 451).

The term "occurrence" was defined as: "[A]n event or continuous or repeated exposure to conditions which unexpectedly causes . . . physical destruction of tangible property . . . during the policy period. All such exposure to substantially the same general conditions existing at or emanating from each premises location shall be deemed one occurrence." (JA 468).

Paragraph 10 of the Conditions of the Continental policy, under the heading "Loss Payable," provides:

> "Liability under this policy with respect to any occurrence shall not attach unless and until the Insured, or the Insured's underlying insurers, shall have paid the amount of underlying limits on account of such occurrence." (JA 456)

Under the terms of an endorsement to Continental's policy, it was agreed by Continental that

> "in the event of loss for which [Champion] has coverage under [underlying insurance], the excess of which would be recoverable hereunder, except for terms and conditions of this policy which are not consistent with the underlying, then, notwithstanding anything contained herein to the contrary, this policy shall be amended to follow the terms and conditions of the applicable underlying insurances in respect of such loss" (Endorsement No. 17).* (JA 487)

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* In a footnote at page 16 of its brief, Continental refers to Endorsement No. 17, and seeks to shrug aside this provision. Plainly, Endorsement No. 17 reinforces that Champion is entitled to a broad and liberal construction of the policy provisions to fulfill its reasonable expectation and purpose in purchasing a comprehensive and umbrella excess policy. Continental's niggardly reading of the insurance policies does violence to the manifest import of the policies as a whole, including Endorsement No. 17.

All in all, the internal provisions of Continental's Umbrella Excess policy fortify the judgment below. Indeed, as demonstrated in Point II, *infra,* the Continental policy provisions omitted in Continental's presentation disable Continental from unilaterally rewriting its policy and adding an absent limit of coverage.

Continental's Brief Is Replete With Factual Errors and Distortions

As we have seen, and as was twice confirmed by Judge Solomon in his two opinions (JA 163, 302), Continental, at the trial on liability, had restricted itself to a solitary and exclusive thesis that the damage to each vehicle was a separate occurrence. Continental waived and abandoned any other contention. Indeed, it offered no evidence in support of any other contention. Now, uncomfortable with the position on which it had staked its all in litigating liability, Continental has opted to construct an unworthy facade of false or inconsequential statements and innuendos, heedless of the fact that all too often Continental's own statements in the proceedings below belie its presentation on appeal. A few telling illustrations will suffice to spotlight the degree to which Continental's brief is in headlong flight from the actual record.

1. In the proceedings before Judge Solomon, Continental's counsel explicitly stated (JA 236-7):

> "MR. HART: * * * *It is the view of the defendant in this case [th]at the time when these panels were purchased by Champion, the time when they were sold by Champion, the time when they were put into the vehicles, all of those things are immaterial to the determination of liability here.* Your Honor has disagreed with us on that.
>
> "THE COURT: I don't know how I have disagreed. In what way, Mr. Hart? I just said that in my view it was one occurrence, which seems to confirm your contention that the material which you now request is immaterial.

> "MR. HART: If your Honor so holds we will go on, *I don't need to have the information.* I believe that your Honor's last statement, leaving out the conclusion that your Honor found in your opinion, is indeed the position taken by the defendant. *We regard those facts as being immaterial.*" (Emphasis added).

Against the backdrop of Continental's position below, we fail to see what Continental hopes to accomplish by trading on the archeology (Appellant's brief, pp. 7-8) that prior to trial Continental had plagued Champion with harassing discovery requests that Champion assemble its voluminous sales invoices and other evidentiary minutiae with respect to its transactions with its customers. To us it had seemed clear that Continental was pressing for this microscopic dissection in order to delay for as long as possible the trial on the issue of liability. We devoted literally months to assembling all of this data for inspection by Continental's counsel. Continental's counsel, for months, had the opportunity to review this material, and spasmodically exercised its discovery privileges (JA 102).

In the proceedings before Judge Pollack, who conducted a pre-trial conference to accommodate Judge Stewart, to whom this case was originally assigned, we took strong exception to Continental's harassing discovery tactics. Judge Pollack, however, was of the view that since he was not going to be the trial judge, he deemed it more orderly procedure for us to make available to Continental the minutiae which it requested, even if it were to play no role in the case. The necessity for this mountain of data could be determined at trial, according to Judge Pollack, contingent upon the positions being advanced at trial. The short of it was that when we came to trial, and Continental could no longer badger Champion with meaningless discovery, all of the morass with respect to sales of the panels by Continental to its customers was eliminated from the trial. At trial, Continental and its counsel presented as their entire position, so correctly described in Judge Solomon's opinions of May 1, 1975 (JA 163) and October 31,

1975 (JA 302), the *solitary* thesis that each manufactured vehicle which utilized defective panels was a separate occurrence, abandoning all other arguments.

In this setting, there is absolutely no warrant for Continental's brief to make inflammatory (and false) innuendos that Judge Solomon was somehow precluded from determining the issue of liability in the absence of the minutiae which Continental itself has repeatedly confessed are immaterial to the liability question.

2. Continental's isolated remarks (Appellant's Brief, p. 8) concerning the pre-trial conference before Judge Solomon are meaningless—and incomplete. In actuality, Champion proposed the separate trial on liability (JA 98-9); and when Continental's counsel had indicated that the issue of liability somehow depended upon its reviewing the massive sales records, Judge Solomon quite properly rejected Continental's gambit. We quote from the September 20, 1974 pre-trial conference:

> "MR. HOLLAND [Continental's counsel]: . . . So, to be able to present all issues to the Court, we have been reviewing, in addition to the claims of Liberty Mutual, who adjusted the loss, we have been looking at the record of the sales.
>
> "THE COURT: You think it is necessary to examine each and every invoice in order to be able to understand the legal issues involved in this case?
>
> "MR. HOLLAND: I'm inclined to believe that.
>
> "THE COURT: I don't think so. . . ." (JA 97-8).

Continental had acknowledged to Judge Solomon, at pretrial, that it was virtually finished with its review of Liberty Mutual's settlements of the damage claims (JA 97, 101). And, as noted, at the trial of liability, the operative facts were conceded; and later, at the hearing on damages, the reasonableness and good faith of the settlement payments were conceded, and this concession was reflected in Judge Solomon's findings (JA 303).

3. Continental's Brief (at p. 15) makes a half-hearted (and astonishing) suggestion that there is nothing in the record to support Judge Solomon's findings (JA 159, 303)

that Champion had purchased all the defective panels from Continental Vinyl. Suffice it to say: In connection with the hearing on liability, Continental, in its own recital of the facts, had identified Continental Vinyl as the source (JA 583-6). Continental accepted, without quibble or challenge, Judge Solomon's summary of the core facts, at the outset of the hearing, which reflected Continental's concession (JA 106). Continental's judicial admission was *conclusive*. For purposes of the trial on liability, "the fact is thereafter to be taken for granted; so that the one party need offer no evidence to prove it, and the other is not allowed to disprove it . . . The vital feature of [Continental's] admission is the prohibition of any further dispute of the fact". 9 Wigmore on Evidence [Third Edition] §§ 2588, 2590. See also the landmark case of *Oscanyan* v. *Arms Co.*, 103 U.S. 261, 263, 26 L.Ed. 539 (1881). (Any fact admitted by counsel "may be the ground of the court's procedure, equally as if established by the clearest proof"); and *Hill* v. *F.T.C.*, 124 F.2d 104, 106 (5th Cir. 1941). It therefore ill becomes Continental to suggest an erasure of its own judicial admission which contributed to the Court's findings of fact.

Furthermore: Continental itself, at the trial on liability, put into evidence (JA 155) Champion's responses to interrogatories which were replete with documentation (JA 70-87) corroborating the identification of Continental Vinyl as the manufacturer of the defective vinyl-covered panels (JA 29). And, if more need be said, we quote from the depositions of Champion's customers:

Mr. Lofgren, President of Lofgren Manufacturing Company, testified:

> "Question 10. If your company purchased the vinyl-laminated plywood panels which were installed in the products manufactured by it and identified in Schedule "A," state the name of the company from which your company purchased those panels.
>
> "A. Continental Plywood—what is their true name—originally, we purchased directly from Continental Vinyl Products Corporation; and, then, just prior

to the delamination problem, we started buying through U. S. Plywood Corporation because Continental had set them up as a distributor; authorized distributor.

"Question 11. State whether the vinyl-laminated plywood panels installed by your company in the products identified in Schedule "A" were delivered to your company in bundled packages or cartons which identified the manufacturer of those boards, and, if so, state the company so identified as the manufacturer of those boards.

"A. I am not sure if each bundle had a tag, designating "Continental Vinyl," but they were sold to us and delivered and invoiced by Continental Vinyl; later, by U. S. Plywood for Continental Vinyl." (JA 399).

Similarly, Mr. Ralph H. Lang, President of Rancho Trailers, Inc., testified:

"Q. 10. If your company purchased the vinyl-laminated plywood panels which were installed in the products manufactured by it and identified in Schedule A, state the name of the company from which your company purchased those panels.

"A. The name of the company is U. S. Plywood, *1968* South 2nd West in Salt Lake City.

"Q. 11. State whether the vinyl-laminated plywood panels installed by your company in the products identified in Schedule A were delivered to your company in bundled packages or cartons which identified the manufacturer of those boards; and, if so, state the company so identified as the manufacturer of those boards.

"A. They occurred in cartons. I believe they were cardboard cartons. They said "Continental Vinyl" on them . . ." * (JA 420-1).

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* As we have noted, Continental's *sole* position on liability was that, *irrespective of the source of the panels*, the damage to each vehicle should be treated as a separate occurrence. Consistent with this, Continental's counsel repeatedly acknowledged to Judge

4. Appellant's brief (pp. 10-12) seeks to generate a non-existent air of mystery as to what the respective positions of the parties were at the trial on liability. The short correction of appellant's self-generated confusion is: At the trial on liability, and in every brief that Champion submitted to Judge Solomon on liability, Champion articulated its position: All property damage from the delamination of the vinyl-covered panels is to be considered as arising from one occurrence, since that damage arose out of continuous or repeated exposure to substantially the same general conditions. Champion urged that its position is not only a possible, but indeed a palpably reasonable construction of the Liberty Mutual policy in light of the policy's key unifying directive.

Continental, on the other hand, presented as its position its thesis that despite the unifying directive, and despite the Liberty Mutual policy's express rejection of a "per claim" deductibility standard, the Liberty Mutual policy was susceptible of only one possible construction; i.e., that each incident of property damage, vehicle by vehicle, must be treated as a separate occurrence subject to a separate $5,000 deductible.

Liability was fought out on this front. Champion prevailed. The trial court ruled that "the position asserted by the insured" (JA 163) was a reasonable one, and against the backdrop of the conceded facts concisely summarized by the Court in its opinion, and under controlling decisional law, Champion was entitled to a recovery (JA 163-5). Appellant's brief, in purporting to summarize Judge Solomon's opinions, excises the very heart of Judge Solomon's determination. Appellant makes no effort to discuss, much less distinguish, the authorities relied upon by Judge Solomon (JA 163-4). Indeed, Judge Solomon's

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Solomon that he "would not expect to contend that the source of the purchase of panel by Champion has any materiality to the question of whether there was one or more than one occurrence. I would not so contend. I also, therefore, as a corollary, believe that it is immaterial that they bought it from Continental Vinyl . . ." (JA 232).

references to applicable decisional law are cut out of appellant's treatment. In our ensuing presentation of the law, we shall fill the void in appellant's surgery.

POINT I

Champion's position that all property damage from the delamination of the vinyl-covered panels is to be considered as arising from one occurrence, is clearly a reasonable construction, fortified especially by the Liberty Mutual policy's unifying definitional directive. Accordingly, under all the applicable authorities, Champion must prevail.

Continental's position is hinged to a tortured construction that there were 1400 separate occurrences, with each damaged vehicle subject to a $5,000 deductible. Continental's thesis makes a mockery of the package of Comprehensive General Liability insurance and Umbrella Excess Third Party Liability insurance. Accordingly, under all the applicable authorities, Continental cannot wriggle out of its clear undertaking in its Umbrella Excess policy.

In general, Continental's brief to this Court engages in futile esoteric semantic exercises in seeking to find a nonexistent erasure of coverage. But Continental's groping for an arcane misconstruction of policy provisions is halted, *in limine*, with the unifying definitional directive in the Liberty Mutual policy that:

> "For the purpose of determining the limit of the company's liability . . . all . . . property damage arising out of continuous or repeated exposure to substantially the same general conditions . . . shall be considered as arising out of one occurrence." (JA 498-9).

This provision, which, moreover, brings within its orbit *"substantially"* the *"same general"* conditions, is concededly "the basic provision" controlling the construction of the Liberty Mutual policy (JA 117-8, 140-1). It alone is so dispositive in rejecting Continental's bizarre and incredible reading of the Liberty Mutual policy that we need not

dwell upon still other all-encompassing provisions in the policy which support the construction that Section IV of the Liberty Mutual policy tied together so explicitly (pp. 16-21 hereinabove).

All in all, the policy language of Liberty Mutual's Comprehensive General Liability policy compellingly underscores the propriety of the construction which Liberty Mutual placed upon its own standard policy in meeting its insurance obligation to Champion and paying to Champion the full amount of its limit of liability on account of the occurrence within the policy's coverage.

As we have noted (pp. 20-21, hereinabove), applying the Liberty Mutual policy provisions to our Corrected Statement of the Case:

> a) the "*injurious exposure*" resulting in property damage has been the installation of defective vinyl-laminated plywood panels in completed products manufactured by others;
>
> b) the "*conditions*" to which the property suffering damage has been exposed are the *defective panels manufactured by Continental Vinyl which inexorably delaminated following installation;* and
>
> c) all diminution in value (*property damage*) resulting from the continuous or repeated installation by manufacturers in a completed product (*exposure*) of defective panels manufactured by Continental Vinyl which inexorably delaminated (*substantially the same general conditions*) constitutes property damage arising out of one occurrence within the meaning of the Liberty Mutual policy.

All in all, Continental, under its Umbrella Excess Third Party Liability policy, had clearly undertaken to pay for property damage in excess of "the amount recoverable" under Champion's underlying insurance (Continental policy, Declarations, item 3(A)) (JA 447). The "amount recoverable" under Liberty Mutual's underlying insurance for the property damage herein involved is $100,000. Liberty Mutual has paid to Champion the $100,000. Conti-

nental is, therefore, legally obligated to pay Champion the excess coverage provided in the Continental policy.

As we have seen (pp. 2-3, 15 *et seq.* hereinabove) Continental's exclusive position, on which it staked its all at the trial on liability, that the deductible amount in the Liberty Mutual policy should be applied to each incident of property damage, unit by unit, and thereby scrap the unifying definitional directive, scrap the policy's express rejection of a "per claim" deductibility standard, cancel out Liberty Mutual's Comprehensive coverage, and make Continental's Umbrella Excess policy an empty charade, is (to understate the point) scarcely the *only* possible reasonable construction of the policy provisions. Continental's thesis, which reduces the Liberty Mutual policy to an absurdity, and Continental's own Umbrella Excess Liability to a duplicating absurdity, runs afoul of *every* applicable canon of construction of an insurance policy.

At the threshold, we observe that New York law concededly* controls the issue of the legal interpretation of the policy provisions. *Lumbermens Mutual Casualty Co.* v. *Town of Pound Ridge*, 362 F.2d 430, 432 (2nd Cir. 1966); *Thomas* v. *Mutual Benefit Health and Accident Association*, 123 F.Supp. 167, 169 (S.D.N.Y., Dawson, J., 1954), unanimously affirmed 220 F.2d 17 (2nd Cir. 1955).

(1) *The Controlling New York Law*

It is clear beyond cavil that New York clearly and unequivocally adheres to several basic rules:

1. The terms of insurance policies must be liberally interpreted in favor of the insured.

2. Any and all ambiguity must be resolved in favor of the insured.

3. The burden which the insurer must carry is to show, clearly and conclusively, that the construction it urges is the *only* one that fairly could be placed on the policy.

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* Appellant's brief, at p. 22, is constrained to accept that the New York decisional law is controlling; yet, notwithstanding this admission, appellant's brief has thrown up a smokescreen of citations in other jurisdictions which are of no functional utility on this appeal.

When that condition is not satisfied the rule is to choose the construction most favorable to the insured.

4. The criterion for construction of a business liability insurance policy is a broad and liberal interpretation to fulfill the reasonable expectation and purpose of the businessman in entering into and relying upon such a specialized business policy.

5. All of these canons of construction in favor of an insured have special vigor when applied to a broad policy such as "a Comprehensive General Liability" policy and an "Umbrella Excess Third Party Liability" policy.

In *National Screen Service Corp.* v. *United States Fidelity and Guaranty Company*, 364 F.2d 275 (2nd Cir.), *cert. den.* 385 U.S. 958 (1966), these principles of New York law were forcefully invoked by this Court:

> "[I]n construing the specialized business policy [a comprehensive general liability policy] with which we are concerned . . . [the] measure is that enunciated in Tonkin v. California Insurance Company of San Francisco Inc., 294 N.Y. 326, 329, 62 N.E.2d 215, 216, 160 A.L.R. 944 (1945), in which the Court of Appeals said, 'We know of no better guide in a situation of this sort than "the reasonable expectation and purpose of the ordinary businessman when making an ordinary business contract."'
>
> * * *
>
> "In Sincoff v. Liberty Mutual Ins. Co., 11 N.Y.2d 386, 230 N.Y.S.2d 13, 183 N.E.2d 899 (1962) the New York Court of Appeals held that where there is an ambiguous word in an insurance policy the burden which the defendant insurer must carry is to show that the construction it urges is such 'that it would be unreasonable for the average man reading the policy to conclude' that a meaning other than that urged by the insurance company was possible and 'that its own construction was the only one that fairly could be placed on the policy.' 230 N.Y.S.2d at 16. Thus, it would seem that in New York the insurance company can avail itself of the plain meaning rule only

in those cases where 'such a definition was the *only* one that could "fairly be placed thereon."'. (Emphasis in original.) 230 N.Y.S.2d at 15. See also Hartol Products Corp. v. Prudential Ins. Co., supra, 290 N.Y. at 49-50, 47 N.E.2d 687. The appellant [insurer] has not met that test in this case.

* * *

"The rule would seem to have special vigor when applied to a policy such as the one involved here which is by its own terms denominated a 'comprehensive general liability policy.' Cf. *Sincoff*, supra, 230 N.Y.S. 2d at 16 * * *" (364 F.2d at 278-80)

In *National Screen, supra,* this Court ruled that the firm concepts of New York insurance law were so strong that the Second Circuit was constrained to rule in favor of the insured, despite the fact that the Ninth Circuit, on a set of facts virtually identical to those in *National Screen,* had decided in favor of the ~~insured.~~ insurer. (364 F.2d at 280).

Indeed, if anything, the *National Screen* opinion understated the ever increasing emphasis with which the courts of New York have given renewed reaffirmations of the principles so cogently marshalled in *National Screen, supra.* Any and all ambiguities must be resolved in favor of the insured, namely, Champion. *Bronx Savings Bank* v. *Weigandt,* 1 N.Y.2d 545, 551-2 (1956); *Sincoff* v. *Liberty Mutual Fire Insurance Co.,* 11 N.Y.2d 386, 390-1 (1962); *Tonkin* v. *California Insurance Co.,* 294 N.Y. 326, 328-9 (1945); *Hartol Products Corp.* v. *Prudential Insurance Co.,* 290 N.Y. 44, 49-50 (1943).

"[I]nsurance contracts, above all others, should be clear and explicit in their terms. They should not be couched in language as to the construction of which lawyers and courts may honestly differ. In a word, they should be so plain and unambiguous that men of average intelligence who invest in these contracts may know and understand their meaning and import." *Bronx Savings Bank, supra; Hartol Products Corp., supra; Janneck* v. *Metropolitan Life Insurance Co.,* 162 N.Y. 574 (1900); *Lumbermens Mutual* v. *Pound Ridge,* 362 F.2d 430 at 432 (2nd Cir. 1966).

It is simply not enough for an insurer, like Continental here, to contrive a narrow construction of what constitutes an "occurrence" through a web of self-serving semantic shadings, obliteration of a unifying definition, and evisceration of the insurance coverage that was within the reasonable expectation and purpose of Champion, unless Continental's construction is the *only one possible*. Nothing is clearer in New York law that if any construction favors Champion, even though not the only construction, Champion must prevail. *Sincoff* v. *Liberty Mutual Insurance Co., supra; Hartol Products Corp., supra; Datatab, Inc.* v. *St. Paul Fire and Marine Insurance Co.*, 347 F.Supp. 36, 38 (S.D.N.Y., Lasker, J., 1972)*.

The foregoing basic rubrics of the controlling insurance law apply *a fortiori* where the Liberty Mutual policy itself intrinsically supports Champion's (and Liberty Mutual's) reasonable construction (see pp. 16-21, hereinabove); and it is not Liberty Mutual but Continental which is rewriting the Liberty Mutual policy. Further, under New York law, Liberty Mutual's own construction of its own policy is of major importance in resolving the legal issue of policy interpretation. "If doubt there be as to the construction given to the documents, such doubt should be removed when the acts of the parties and the interpretations which they place upon the contracts are considered." (*Thompson-Starrett Co.* v. *American Mutual Liability Insurance Co.*, 276 N.Y. 266, 272 [1937]). "The practical construction put upon a contract by the parties to it, is sometimes almost conclusive as to its meaning." (*Nicoll* v. *Sands*, 131 N.Y. 19, 24 [1892]).

It is also noteworthy that New York forcefully applies, in construing insurance obligations, the principle of insurance law that "every underwriter is presumed to be ac-

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* Continental's counsel conceded, at the trial on liability, that under the controlling New York law we have cited Continental has the burden of establishing "that the reading of the policy, in the manner in which Mr. Shainswit [Champion's counsel] has read it, is an unreasonable construction" (JA 143). Continental's position on liability collapsed below because it could not carry that burden, and manifestly so.

quainted with the practice of the trade he assures"; the insurer "is presumed to have been acquainted with the risks." (*Globe and Rutgers Fire Insurance Co.* v. *Winter Garden Co.*, 9 F.2d 227, 229 (2nd Cir. 1925); *Sincoff* v. *Liberty Mutual Fire Insurance Co., supra,* 11 N.Y.2d 386, 391 [1962]. Here, Liberty Mutual (and Continental) had full knowledge of the nature of Champion's business operations. Each carrier knew that Champion was engaged in the business of selling panels* to manufacturers, in disparate locations, for installation in the manufacturers' completed products. Each carrier, in consequence, knew that the risk of a delamination catastrophe was inherent in the very nature of Champion's particular operation, and hence was a hazard insured against in the Comprehensive General Liability policy and in the Umbrella Excess Liability policy. Continental's strained construction that there were 1400 separate occurrences is at war with any "commonsense app aisal of the overall situation." (*Ore and Chemical Corp.* v. *Eagle Star Insurance Co.*, 489 F.2d 455, 457 [2nd Cir., 1973]).

Given the setting in which the Comprehensive General Liability policy and the Umbrella Excess Liability policy were written, Continental's aggressive distortion of the meaning, purpose and object of the insurance coverage is condemned by *Lipton, Inc.* v. *Liberty Mutual Insurance Company,* 34 N.Y.2d 356 (1974). In *Lipton,* as here, the insured, Gioia, Inc., had paid premiums on two products liability insurance policies (both with the same insurer, Liberty Mutual). Gioia had sold enriched macaroni and egg noodles, manufactured by it, to Lipton for inclusion by Lipton in its soups which, in turn, were sold nationwide. When it was discovered that some of the macaroni and noodles were contaminated, Lipton recalled its stocks of macaroni and noodles. The issue contested, in *Lipton,* was whether the "withdrawal" policy clauses relate to withdrawal of products by the insured only and do not extend

* The very nature of Champion's operations is to sell panels, doors, sidings and hosts of other construction materials.

to withdrawal by a third party, such as Lipton. In ruling for the insured, the Court of Appeals unanimously stated:

> "It is persuasive that the *obvious intent* of Gioia [the insured] and Liberty Mutual when the multi-peril and umbrella policies were written was to afford Gioia *substantial economic protection* from exposure to claims of third parties against Gioia in consequence of defects in Gioia's products. *To say that the categories of damage claimed here by Lipton do not fall within such coverage would appear to exclude what, as a practical matter, would usually be some of the largest foreseeable elements of such damage.* Such an interpretation * * * *would render the coverage nearly illusory.* * * *
>
> "We cannot think that, *given the economic and factual setting in which these policies were written,* an ordinary businessman in applying for insurance and reading the language of these policies when submitted, would not have thought himself covered against precisely the damage claims now asserted by Lipton." (34 N.Y.2d, at 361; emphasis added.)

We add to *Lipton, supra,* Judge Lasker's final* emphasis in *Lee & Palmer, Inc.* v. *Employers Commercial U. Ins. Co., Inc.*, 360 F.Supp. 654 (S.D.N.Y. 1973) that the defendant insurer's version of its own policy:

> ". . . is unreasonable because its interpretation would literally have deprived Lee & Palmer of all coverage on the risk central to its business which it obviously intended to secure. Where, as here, it is possible reasonably to construe the policy to avoid such a result, New York Law requires us to rule in favor of the assured. [Citation.]" (360 F.Supp. at 658).

We need hardly elaborate that here, the risk central to its business, which Champion obviously intended to have

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* Judge Lasker opened his opinion with extensive quotations from *National Screen Service Corp.* v. *United States Fidelity and Guaranty Co.*, 364 F.2d 275 (2nd Cir., 1966), *supra*, singling out the very same excerpts from the *National Screen* opinion that we have quoted.

covered in the Comprehensive and Umbrella Excess insurance package, was the hazard of a delamination or similar catastrophe, involving a common defect with respect to a huge number of completed products utilizing defective panels, or other wood or paper products. The hazard is, of course, compounded when Champion, as here, acquired the defective panels from Continental Vinyl and could not, itself, guard against defects in the manufacturing process. In its usual and ordinary plywood operations, the foreseeable damage to a single completed manufactured product almost inevitably would be below $5,000, but the total property damages flowing from a single occurrence could be gigantic, as it was in this case.

In the setting of *National Screen,* and all the other foregoing authorities, there is not one iota of justification for Continental's position that the insurance coverage can be contorted into equating each incident of damage to a vehicle with a separate occurrence, and thereby frustrating Champion from receiving even one cent of indemnification for its loss of more than $1,600,000. Continental's position in effect seeks to write an exclusion into the Liberty Mutual policy that is non-existent. Continental's position mocks the unifying definition and bypasses the very language and format of the deductible provision (pp. 17-18 hereinabove). The recent unanimous decision of this Court in *Pan American World Air, Inc.* v. *Aetna Cas. & Sur. Co.*, 505 F.2d 989 (2nd Cir. 1974), forcefully attests that Continental's instant arcane game of semantics is a self-confession that Continental has failed to satisfy the exacting —and dispositive—standard of New York law that its bizarre misreading of the policy provisions must be the *only* one possible.

In *Pan American World Air, supra,* this Court emphasized that the *Sincoff* "maxim defines the scope of coverage as much as if it were a clause in the all risk policies. It is part of the understanding of the parties." (505 F.2d at 1003). This Court's language fits like a glove Continental's misconstruction and misapplication of the $5,000 deductible:

> "[I]t is not sufficient for the all risk insurers' case for them to offer a reasonable interpretation under which the loss is excluded; they must demonstrate that an interpretation favoring them is the only reasonable reading * * * Sincoff v. Liberty Mutual Fire Insurance Co., 11 N.Y.2d 386, 390 (1962). *Sincoff* states the well-established New York rule for all types of insurance. [Citations]*" (505 F.2d at 1000).

In *Pan American World Air*, this Court also emphasized (at p. 1001) the conclusive significance (paralleled in our case) that opposing counsel "have been able to infer *radically different versions*" of the provisions in dispute:

> "The plausibility of several of these interpretations is convincing evidence of the ambiguity of the exclusions, and a compelling reason for applying contra proferentem against the all risk insurers." (505 F.2d at 1002).

Furthermore, the fact that the all risk insurers had to spin a position out of an assortment of policy exclusions established, convincingly (at p. 1003):

> "[E]ach of the exclusions is ambiguous or has only uncertain application to the facts. 368 F.Supp. at 1117; see Sincoff v. Liberty Mutual Fire Insurance Co., 11 N.Y.2d 386, 390, 230 N.Y.S.2d 13, 16, 183 N.E.2d 899 (1962); Silverstein v. Commercial Casualty Insurance Co., 237 N.Y. 391, 393, 143 N.E. 231, 232 (1924). The all risk insurers' shotgun approach belies its claim that these terms have certain fixed meanings."

The foregoing, we submit, applies *a fortiori* here to Continental's juggling act with the definition of an occurrence, the unifying definitional directive, and the deductibility format (Appellant's brief, pp. 32-35). For, upon analysis,

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* In *Rickerson* v. *Hartford Fire Ins. Co.*, 149 N.Y. 307, 313 (1896) [cited in Pan American World Air], the Court of Appeals stressed that *in all insurance cases*, no rule is more "imperative or controlling" than the mandate: "When the words are, without violence, susceptible of two interpretations, that which will sustain [the insured's] claim and cover the loss must, in preference, be adopted."

Continental's position is reduced to the verbal legerdemain that the *unifying* definitional directive is merely a restatement of the definition of an occurrence. Continental's own presentation to this Court serves to dramatize that the language on which it constructs its web of semantic confusion "is ambiguous or has only uncertain application to the facts" (*Pan American World Air* at 1005) which we have detailed in our corrected statement of the case.

The fact that Continental's version supplies no coherent justification for the inclusion of the unifying definition, fortifies Judge Solomon's findings below that the contested provisions of the policies are, at the very least, ambiguous, and a one occurrence interpretation is reasonable (JA 164-5). As indicated in *Pan American World Air* (at p. 1004), the District Court's findings, in dealing with the construction of the policy provisions, are, to some degree, within the purview of the clearly erroneous standard governing an appeal.

On the record as a whole, and in the perspective of the foregoing controlling authorities, the judgment below is unassailable, and unmistakably so.

(2) *An Apt Concise Summary of the Controlling New York Law*

Stauffer Chemical Co. was represented by Hart & Hume, Continental's present counsel, in *Stauffer Chemical Co.* v. *Insurance Company of North America*, 372 F.Supp. 1303 and 1308 (1973) [discussed *infra*]. In their Brief to Judge Gagliardi, our brothers at the Bar presented a correct exposition of New York insurance law:

> "In order for an insurer to prevail in its contention that a particular hazard is excluded, the insurer must establish that the words and expressions used are reasonably susceptible of *only** one construction, namely that favorable to the insurer. *Sincoff* v. *Liberty Mutual Fire Insurance Company*, 11 N.Y.2d 386, 390 (1962). [Additional Citations.] If the insured can

* The word "only" is underscored in the *Stauffer Chemical* Brief.

offer a reasonable interpretation, it must be accepted. *Datatab, Inc.* v. *St. Paul Fire and Marine Insurance Company*, 347 F.Supp. 36, 38 (S.D.N.Y., 1972)." (Plaintiff's Memorandum on the issue of liability, p. 29).

Applying this firm principle of New York insurance law to our record, it is self-evident, we submit, that the Liberty Mutual policy is fully susceptible of the construction which Liberty Mutual itself put upon it. Continental's tortuous construction is scarcely the *only* possible meaning which can be ascribed to the policy provisions. In consequence, Continental cannot disclaim or erase liability.

(3) *The Precise Precedents Dealing With the Unifying Definition in the Liberty Mutual Policy*

In *Aetna Casualty and Surety Co.* v. *Martin Bros. Container and Timber Products Corp.*, 256 F.Supp. 145 (D. Oregon, 1966), Judge Kilkenny ruled that the spasmodic emissions of flyash, over a period of many months, causing damages to many claimants from the deposit of flyash on different properties, constituted an "occurrence" within the definition of the insurance coverage precisely paralleled by our unifying definition (256 F.Supp. at 148, n. 2; 149, n. 4). In ruling for the insured, Judge Kilkenny stated, vis-à-vis the policy definition:

> "A liberal construction of this language in favor of the assured, justifies a finding that *the insurance company, when drafting the contract, had in mind a series of events similar to those presented by this record.*" (256 F.Supp. 150; emphasis added).

A similar "series of events" is also involved in the instant situation.

In the twin cases, *Stauffer Chemical Co.* v. *Insurance Company of North America*, 372 F.Supp. 1303 and 1308 (1973, Gagliardi, J.), Stauffer was insured under defendant's blanket liability policy, which defined an "occurrence" as a "continuous or repeated exposure to conditions which unexpectedly and unintentionally caused injury to or destruction of property during the policy period . . ."

In resolving the issue of coverage, Judge Gagliardi considered it natural and reasonable to describe the continuous or repeated exposure to conditions presented in the *Stauffer Chemical* record, i.e., treatment with the ineffective product manufactured by Stauffer causing injury to the crops of dozens of customers in their disparate business locations, as constituting a *single* occurrence. Judge Gagliardi said:

> "It is . . . apparent that the injury to claimants' potato seed pieces and potato crops 'unexpectedly and unintentionally' resulted from a 'continuous or repeated exposure to conditions,' thus constituting *an* 'occurrence' within the [policy] meaning." (372 F.Supp. at 1305; emphasis added).

Plainly, it is even more natural and reasonable for Liberty Mutual to similarly construe its own policy on a comparable set of facts where the Liberty policy contains a *mandate* that all property damage "arising out of continuous or repeated exposure to *substantially* the *same general* conditions . . . *shall be considered as arising out of one occurrence.*"

The third case in our trilogy is *Grand River Lime Co.* v. *Ohio Casualty Insurance Co.*, 289 N.E.2d 360, 32 Ohio App.2d 178 (Court of Appeals of Ohio, 1972). One of the questions before the Court was whether a record involving 200 claims of property damage caused by Grand River in its quarrying and manufacturing operations as a result of the emission of air pollutants, for a period of seven years, constituted an "occurrence" as defined in the Ohio Casualty policy, thereby imposing upon Ohio Casualty the duty to provide the defense against the claimants.

The Court, in finding that the ramified property damage may be interpreted as "an occurrence", and thus within the coverage of the policy, spotlighted the unifying clause in the Ohio Casualty policy—the clause also present in the Liberty Mutual policy, *haec verba* (289 N.E.2d at 365).

Union Carbide Corporation v. *Travelers Indemnity Co.*, 399 F.Supp. 12 (WD Pa., 1975, Weber, J.), also has il-

luminating pertinency. There was no unifying definition as in our case. But even without it, the Court ruled that there was only one "accident" where the insured had sold a defective chemical to a manufacturer which had produced resins sold to its customers, who in turn had incorporated the resins in manufacturing diverse products (e.g., floor tile, paint, floor mats, shoes, and the like). Numerous claims for damages had been made by consumers, retailers, wholesalers and manufacturers. In rejecting the claim of the excess carrier that the products liability suit should be determined by treating each of the numerous damage claims, spread over several years, as a separate accident, Judge Weber ruled:

> "We can only rely on the ordinary meaning of the words, in relation to the business risk to be insured against, protection from liability from a defective product produced in a continuous flow of production and intended for widespread use by many manufacturers ending in a multitude of consumer products in many hands. To hold that each ultimate consumer's dissatisfaction with the product is a separate 'accident' would violate all reasonable interpretations of the term 'accident'." (399 F.Supp. at 20).

A fortiori, where we have a unifying definition.

(4) *Appellant's Authorities Are All Irrelevant or Actually Adverse to Its Contentions*

Johnson Corp. v. *Indemnity Ins. Co. of N. A.*, 7 N.Y.2d 222 (1959)—cited in Appellant's Brief at pp. 22, 29-30—has nothing to do with products hazard liability coverage. Further, the opinion provides no comfort for Continental. In connection with subway construction, the issue presented was whether there was one accident or two accidents within the coverage of a liability policy providing for "$50,000 each accident." *The policy said nothing more than that.* Needless to say, the policy totally lacked the definition of our Liberty Mutual policy that all property damage arising out of continuous or repeated exposure to substantially the same general conditions, shall be considered as arising

out of one occurrence. In finding that there were two separate accidents, thereby *increasing* the carrier's liability, the Court stressed that the insured was entitled to *fuller* indemnification because of the "reasonable expectation and purpose of the ordinary businessman when making an ordinary business contract" (7 N.Y.2d at 227).

In *Sturges Mfg. Co.* v. *Utica Mut. Ins. Co.*, 37 N.Y.2d 69 (1975) (Appellant's Brief, p. 22), the Court actually ruled that the term "occurrence" in a comprehensive policy was sufficiently broad so as to encompass all of the claims of property damage arising out a common defect in the manufacture by the insured of ski straps which had been sold to the insured's customers for incorporation in ski bindings ultimately sold by the ski retailers. Further, the Court invoked *Lipton, supra,* and *Sincoff, supra,* in rejecting the carrier's reliance upon a standard form clause to defeat coverage. As here, the carrier's thesis was scarcely the only possible construction.*

In *Hartford Acc. & Ind.* v. *Wesolowski,* 33 N.Y.2d 169 (1973) (Appellant's Brief, pp. 29-30), the Court simply ruled that in "the perspective and expectation of the ordinary purchaser" of an automobile liability policy (p. 173) a "three-car accident" was a single accident.

In *Hamilton Die Cast, Inc.* v. *U.S. F. and G. Co.*, 508 F.2d 417 (7th Cir. 1975) (Appellant's Brief, pp. 23-24), the opinion, in the main, revolved around coverage. In our case, coverage is conceded. Secondly, in *Hamilton Die Cast* the parties were in dispute as to whether there was any occurrence at all under the policy. In our case, the crux of Continental's position, at trial and on this appeal, is that the damage to each vehicle was a separate occurrence.

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* In *Sturges Mfg. Co.*, in this connection, Chief Judge Breitel said: "If underwriters know what this so-called standard form clause means, the average insured probably does not, and this court most certainly does not. It is for this reason, of course, that exclusionary clauses, when doubtful of meaning, are construed in favor of the insured (*Thomas J. Lipton, Inc.* v. *Liberty Mut. Ins. Co.*, 34 N.Y.2d 356, 361, 357 N.Y.S.2d 705, 707, 314 N.E.2d 37, 38; *supra; Sincoff* v. *Liberty Mut. Fire Ins. Co.*, 11 N.Y.2d 386, 390-391, 230 N.Y.S.2d 13, 15-16, 183 N.E.2d 899, 901-902)." (37 N.Y.2d at 74).

Thirdly, in any event, it is New York law which controls the issue of construction; and under New York law Continental's thesis is spurious.

Continental's reliance upon *St. Paul Fire and Marine Insurance Co.* v. *Northern Grain Co.*, 365 F.2d 361 (8th Cir. 1966) (Appellant's Brief, p. 23), is misplaced—and self-defeating. There, the issue was simply one of coverage (here conceded). It is astonishing for Continental to rely upon this case, since the Eighth Circuit also described the ramified diminutions in crop yield to fully 25 or more of the insured's customers, for which the insured was liable, and therefore, entitled to indemnification from the insurer as constituting *one* occurrence (365 F.2d at 365).*

Continental can scarcely be serious in trotting out *Palardy* v. *Canadian Universal Ins. Co.*, 360 F.2d 1007 (2nd Cir. 1966) (Appellant's Brief, p. 2). In *Palardy*, this Court held that a ladder manufacturer was not entitled to personal injury liability coverage where someone had fallen off a ladder subsequent to the cancellation of a products liability policy. The question was simply one of coverage—which, at our trial on liability, was conceded. Here, Continental presented as its entire position its sole and exclusive thesis that each damaged vehicle was a separate occurrence. No other issue on liability, and no other contention was advanced by Continental. *Palardy*, of course, did not involve the unifying definition present in our case. And, furthermore, it is beyond dispute that our single occurrence was covered under both the Liberty utual and Continental policies (see our Corrected Statement of the Case at p. 6, *et seq.*).

Short shrift can be made of appellant's invocation of *Home Insurance Company* v. *The Aetna Casualty and Surety Company*, Docket No. 75-7357 (2nd Cir. 1976) slip op. 1489 (Appellant's Brief, p. 24). Judge Carter's Opinion

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* Further, the Eighth Circuit, in ruling for the insured, went on to state that under South Dakota law, just as in New York: "As it stands, explicit coverage of the present factual situation is, at best, ambiguous. Such ambiguity must, of course, be resolved in favor of the insured." (365 F.2d at 367).

had dealt with an interpretation of a "lot" clause limitation [sometimes also called the "batch" clause]. The issue before Judge Carter was simply whether there were two batches or four batches. Judge Carter held, in the case before him, that there were two batches. In applying the batch clause, Judge Carter was compelled to treat numerous incidents of damage as subsumed as one occurrence, for purposes of applying the batch clause. Judge Carter, *inter alia*, stressed that the terms of an insurance policy are to be construed according to the understanding of an average businessman. This Court, for reasons not pertinent to our case, reversed Judge Carter's granting of summary judgment, without expressing any opinion on the merits.

We need hardly stress: In our case the "lot" or "batch" clause had been superseded by the unifying definitional directive, which mandated that we were dealing with only one occurrence. Even under Judge Carter's Opinion, the unifying directive would have had a controlling impact. In any event, this Court's reversal of Judge Carter's Opinion devitalizes to some degree its viability. Further, in our case the substantive law of New York controls the construction of the Liberty Mutual and Continental policies, and under *Pan American World Air*, *Lipton*, and *Sincoff*, *supra*, Continental's thesis on this appeal is decisively demolished.

Elston-Richards Storage Co. v. *Indemnity Insurance Co.*, 194 F.Supp. 673 (D. Michigan, 1960) aff'd 291 F.2d 627 (6th Cir.) (Appellant's Brief, pp. 31-2), provides no escape hatch for Continental: (1) In *Elston-Richards*, the policy was totally silent, lacking even a shred of definition as to what was contemplated by the parties as constituting "one event or occurrence." Here, we have a wealth of policy provisions,* capped by the unifying definition tying together, as arising out of one occurrence, all the property damage flowing from the delamination of the Continental Vinyl panels. (2) The unifying definition emerged as a

* For example, we have the cardinal feature that the Liberty Mutual policy itself, on its face, rejected a per claim basis for the application of the deductible (see p. 17 hereinabove).

standard clause in a comprehensive general liability policy, in 1966. As Judge Solomon correctly observed (JA 136), in operative effect the unifying definition perforce overrules *Elston-Richards*, decided six years earlier. (3) And capping everything, *Elston-Richards* can scarcely displace the controlling New York law.

Maurice Pincoffs Company v. *St. Paul Fire and Marine Ins. Co.*, 447 F.2d 204 (5th Cir. 1971) (Appellant's Brief, pp. 2[illegible]-27), unmistakably rejects the proposition for which it is cited, i.e., that the damage to each vehicle which utilized defective Continental Vinyl panels is a separate occurrence. Moreover: (1) *Pincoffs* revolved around Texas law; (2) The dispute was between a primary carrier and excess carrier, with the insured, in all events, being guaranteed the full indemnification; (3) Under the rationale of *Pincoffs*, in connection with the property damage flowing from the delamination catastrophe, where five of Champion's customers alone accounted for an exposure in excess of the $1,000,000 limit of liability in the Continental policy, *Pincoffs* would treat each of these five relationships as constituting an occurrence (p. 13 hereinabove).

The Continental policy provides: "All such *exposure* to substantially the same general conditions *existing at or emanating* from *each premises location* shall be deemed one occurrence." (JA 468; emphasis added). A more whopping ambiguity can scarcely be visualized. Accordingly, under settled New York law, since "each premises location" can reasonably be construed to refer to each premises location of Champion's customer manufacturers, after applying the $5,000 deductible five times, Continental's own policy mandates that it fully honor its excess liability commitment.

POINT II

The monetary award to Champion was entirely proper. Continental's thesis that the calculation of damages requires 1400 separate trials as to the times of delamination is patently spurious.

Answering Appellant's Point III:

1. It is frivolous for Continental to contend, where a single occurrence has already been adjudicated at the hearing on liability, that the subsequent hearing on damages required that the single occurrence be fragmentized, and that 1400 separate trials should be conducted with respect to each of the 1400 vehicles, vehicle by vehicle, as to the point in time that the interior panels of each vehicle commenced to delaminate. In a setting where it has been determined, and properly so, that the damage to all of the vehicles arose from a single occurrence, the times of delamination of individual vehicles were absolutely irrelevant at the damage stage of the case. Indeed, this was conceded by Continental's own counsel (JA 244-246). See also pp. 3-4 hereinabove.

2. In seeking to convert the question of damages into a microscopic massive exploration of 1400 separate time periods, Continental, in effect, is simply resurrecting, in a new disguise, its position that the damage to each vehicle is a separate occurrence. The unified single occurrence does not undergo transformation in computing damages.

3. As the Court below properly emphasized, and repeatedly, one trial on the issue of liability is enough (JA 166, 302). At the trial on the issue of liability, no contention had been advanced by Continental that it was not liable for any categories of specific claims encompassed in the total payments made by Champion. Appellant's own Brief indicates that its urging that it has no liability for individual vehicles is plainly an issue of liability. In seeking at the hearing on damages to fragmentize the occurrence, Continental concededly was seeking to re-try an issue already tried with finality. Judge Solomon properly rebuffed this maneuver by Continental.

4. Continental in its own proposed Conclusion of Law No. 3 which it submitted to Judge Solomon acknowledged, as the inevitable corollary of the Court's finding of a single occurrence: "If all damage constituted a single occurrence, Champion may recover all of its damages, less the $5,000 deductible and less the $100,000 one occurrence limit of the Liberty Mutual policy, but not exceeding the $1 million limit of Continental's liability * * *" (Document 79 in the Index to the Record on Appeal).

5. Delamination is a process of deterioration. Continental, in suggesting that a trial court, and its insured, Champion, must be put to the incredible burden of travelling the labyrinthine road of resolving, vehicle by vehicle, and panel by panel, the mushrooming stages of delamination, is making a mockery of the Umbrella Excess policy, and the reasonable expectation of Champion in paying premiums for such a policy. Can Continental seriously contend that there must be innumerable trials, with hordes of claimant witnesses, to delve into the minutiae of the delamination process as it affected each vehicle? Where a houseboat, camper or trailer had been put away in storage and, many months later, the owner called for the vehicle and detected delamination, are we then to have still further litigation with respect to additional myriad questions as to when the delamination shall be deemed to have commenced? Bearing in mind that the damage sustained by a single vehicle was always less than $5,000, and in many instances just a few hundred dollars, the cost of travelling the road proposed by appellant Continental Casualty Company would render the policy that it issued impractical, pointless and illusory. We quote from *Diamond Shamrock Corporation* v. *Lumbermens' Mutual Casualty Company*, 466 F.2d 722, 726 (7th Cir. 1972):

> "'Were we to adopt the defendant's view of proof required by this policy in this sort of industry, we would render the policy utterly useless to a purchaser because of the impossibility of such proofs.'"

6. The internal provisions of Continental's Umbrella Excess policy reasonably indicate that Champion is entitled to recover *all* of its damages proximately caused by

a single occurrence (see pp. 21-23 hereinabove). There is not an iota of a suggestion in the Umbrella Excess policy that an occurrence is to be fragmentized, as Continental now suggests. Liberty Mutual paid out its $100,000 limit of liability for the occurrence; that payment unmistakably was for an occurrence rooted in Liberty Mutual's policy period, as well as Continental's policy period. All of the provisions in the Continental policy unite in pointing up that Continental cannot now erase its liability to indemnify Champion for all of the sums which it paid, in excess of Liberty Mutual's coverage, on account of the property damage caused by or arising out of the single occurrence. Certainly, if Continental desired to have its policy cover only a part of the damage arising out of a single occurrence, it was incumbent upon Continental to insert such a limitation or exclusion of coverage clearly and explicitly in the policy. *Pan American World Air, Inc.* v. *Aetna Cas. & Sur. Co.*, 505 F.2d 989, 1000 (2nd Cir. 1974), *supra*. "If the defendant intended to limit its liability as drastically as it now claims it did, it should have done a more workmanlike job." *Birnbaum* v. *Jamestown Mut. Ins. Co.*, 298 N.Y. 305, 313 (1948). In *Aetna Cas. & Sur. Co.* v. *Martin Bros. Contain. & Timber Pr. Corp.*, 256 F.Supp. 145 (1966), *supra*, Judge Kilkenny stated (at p. 150):

> "If the language of the policy is ambiguous as to whether coverage is afforded for the entire damage or only a part thereof, the ambiguities must be resolved against the [insurer]."

7. Continental, in seeking to restrict recovery of the damages arising out of a single occurrence, in effect frustrates the very object of obtaining the excess policy. Pragmatically, under Continental's theory, Champion, or others like Champion in similar circumstances, would be disabled from obtaining excess coverage for any period after February 1, 1971, the expiration date of Continental's policy. The delamination catastrophe having occurred, with the damages proximately flowing therefrom continuing, no insurer would step in to provide excess coverage for the delamination catastrophe for any time after Feb-

ruary 1, 1971. Having purchased a package of products hazard liability insurance covering the manufacture, sale or distribution of goods with respect to which it had relinquished possession during the policy period, Champion is entitled to the full products liability coverage that it bargained for.

8. Indeed, in urging that its policy covered only part of the damages flowing from a single occurrence, and that Champion should have sought out a new excess carrier to cover damages flowing from the occurrence already in existence, Continental is devising a limit of coverage barred by public policy concepts. It is improper for an insurance company to issue a policy "where the loss insured against is in progress at the time insurance is purchased." *Presley* v. *National Flood Insurers Association*, 399 F.Supp. 1242, 1244 (E.D. Missouri, 1975, Harper, J.).

9. At the damage stage of this case, the only appropriate questions were the authentication of the payments made by Champion, their reasonableness, and Champion's good faith. *Boutwell* v. *Employers' Liability Assurance Corp.*, 175 F.2d 597, 601 (5th Cir. 1949); *Mitchell* v. *Lindstrom*, 12 A.D.2d 813 (2nd Dep't, 1961); *Cardinal* v. *State*, 304 N.Y. 400, 410 (1952). All of these matters were conceded by Continental. Accordingly, the Court was abundantly authorized in making its monetary award.

CONCLUSION

The judgment below was entirely proper, and should in all respects be affirmed, with costs.

Respectfully submitted,

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